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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MYRA B. ROBINSON, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

Petition for Writ of Certiorari

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Questions Presented for Review

The only question presented for review is whether the petitioner, MYRA B. ROBINSON, herein referred to as the "petitioner," made a taxable gift when, in 1976, she gratuitously surrendered a special testamentary power granted to her under Paragraph 6 of the widow's election will of her husband who died in 1972. Petitioner had elected, in 1972, to accept under such will, which disposed of her community interest. It was stipulated that the value of what she received by such 1972 election exceeded the value of what she surrendered thereby.

Parties

There are no parties hereto other than those named in the caption of the case.

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To the United States Court of Appeals
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Petition for Writ of Certiorari

Official Reports in Courts Below

The official reports of this case in the courts below are found in 75 T.C. 346 (1980) and in 675 F.2d 774 (5th Cir., 1982).

Grounds for Invoking Jurisdiction

(a) The date of the decision of the Fifth Circuit sought to be reviewed is May 14, 1982.
(b) The date of the order denying petitioner's motion for rehearing of such decision is June 10, 1982.
(c) The statutory provisions conferring jurisdiction to grant the requested writ of certiorari are:
(1) *U.S. Const. Art. 3, Sec. 2, Cl. 2*
(2) *28 U.S.C. 1254(1)*

(3) *Supreme Court Rule 17, Paragraphs 1(a) and 1(c):*

(A) The decision below is in conflict with the decisions in other circuits.

(B) The decision below is in conflict with applicable decisions of this Court.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions, statutes and regulations which the case involves, including those in support of jurisdiction, are set out, in pertinent part, in the appendix, and are cited below:

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Statement of the Case

All evidence was stipulated. From such stipulations, and the opinions of the courts below, the following relevant facts are presented:

1. On February 27, 1972, G. R. Robinson, petitioner's husband, died testate and his will was admitted to probate on March 16, 1972. (Stips. 5 and 6)

2. His will gave petitioner a choice — she could elect to let her husband's will direct the disposition of her share of their community property and take fully under the will or she could retain her right to freely dispose of her community property share and take only a specific bequest of personal effects under the will. (75 T.C. 346, 347 and 675 F.2d 776)

3. On August 27, 1972, petitioner filed an election to accept the will's direction of the disposition of her community share. (75 T.C. 347 and 675 F.2d 776)

4. Pursuant to her election and her husband's will, petitioner's community property share became the corpus of the "Myra B. Robinson Trust" (hereinafter wife's trust) while her husband's interest in the community and any separate property he may have owned which was not specifically bequeathed were placed in the "G. R. Robinson Estate Trust" (hereinafter husband's trust). The

terms of the wife's trust provide petitioner with a right to all the net income of that trust for life, while under the husband's trust she has a right to an annual amount from that trust equal to 4 percent of the initial corpus. Upon petitioner's death, the corpora of the two trusts are to be combined and then divided into equal shares for certain descendants of petitioner and her deceased husband. (75 T.C. 347 and 675 F.2d 776)

5. Apart from her powers as trustee (held not to be relevant here), petitioner had the following powers over the wife's trust:

> During the life of my wife, she shall have the power, by recordable instrument delivered to the Trustee, to appoint any part or all of my wife's Trust free from such Trust to any one or more of our issue (or to the surviving spouse of any of our then deceased children) in such shares, manner and proportions as she shall see fit. In addition, my wife shall have the power, by recordable instrument delivered to the Trustee or by Will, to appoint any part or all of my wife's Trust free from such Trust to any one or more charities in such shares, manner and proportions as she shall see fit. Any such power described in this paragraph may be exercised only in a gratuitous way and not in a way which imposes any condition upon the recipient thereof. * * *

Thus, petitioner could appoint any part of the wife's trust to designated appointees or to qualifying charities. On

March 26, 1976, petitioner executed a valid release[1] of these appointment powers. (75 T.C. 348 and 675 F.2d 776)

6. When the wife's trust was created, its value was $731,741.94. The husband's trust had a value of $483,962.01 when it was created. Petitioner was born on

[1]The Fifth Circuit asked why petitioner released the power. The answer below was given (but not as a part of the trial record) in oral argument.

I, undersigned counsel, prepared the widow's election wills of the petitioner and her deceased husband. They were prepared in the light of various tax issues and planning as I understood them. Inflation was not then a serious problem and we were primarily interested in securing the Section 2043 deduction. Two unexpected things occurred.

First, decedent's husband died prematurely in a car accident. As a result her "received" annuity was of greater, and her "surrendered" remainder was of less, value than anticipated when the wills were signed.

Second, by the time of the release inflation was becoming a factor, and the Section 2043 offset would be relatively less valuable than exclusion of the trust.

In fact, it did not dawn on any of us until well into estate administration that petitioner had received an annuity greater than her surrendered remainder. When we realized this, the possibilities of excluding the trust from her estate seemed apparent. However, we were not aware at any time prior to briefing for the Tax Court case that the issue had been decided in any litigated case.

The only reason for the relinquishment of the power was the petitioner's long term uncertainty of how to plan her own affairs by reason of not knowing whether the trust would be included in her estate. The Service has a policy of not ruling on estate tax matters for living persons. *Rev. Proc. 72-3, Section 3.02, 1972-1 C.B. 698.* We were aware of the well established principle that estate and gift taxes are in *pari materia*. We felt that the only way to be certain about the future estate tax status of the trust (for a relatively young widow) was to release the retained power and test the matter by litigation under the gift tax laws.

Special efforts were made to get the gift tax returns audited. Then the examining agent filed a report finding no gift, hence no tax. While normally a favorable taxpayer result, we asked the district director in Dallas to seek technical advice from the Washington office, and we were relieved when Washington decided to propose a tax.

December 20, 1919. (75 T.C. 348 and 675 F.2d 777 footnote 6)[2]

7. The value of whatever petitioner gave up, with respect to her property passing under the will of G. R. Robinson, by reason of her election to take under his will, was less than the value of what she received under such will, with respect to her husband's property, by reason of her election filed on August 22, 1972. (Stip. 15, 75 T.C. 352 and 675 F.2d 777)

8. In its statutory notice of deficiency, the government asserted a gift tax deficiency of $58,676.97 based on its determination that, when petitioner released her special power to appoint, she made a taxable gift of the remainder in the wife's trust corpus (her community property share). (75 T.C. 348)

Basis for Tax Court's Jurisdiction

The basis for the jurisdiction of the Tax Court in this case is 26 U.S.C. 7442.

Argument in Support of Writ

The Fifth Circuit recognized that this Court held in *Sanford's Estate v. Commissioner*, 308 U.S. 39 (1939) that [citing from 675 F.2d 774 (footnote 13)]:

> "[t]here is nothing in the language of the statute, and our attention has not been directed to anything

[2]The disputed adjustment in interest referred to in footnote 6 at 675 F.2d 774 was $23,176.19 (as set out in footnote 2 of 75 T.C. 348). If the government was correct in its contention thereon, it would not change the accuracy of the stipulation referred to in Statement of Fact No. 7 above. The $236,622.58 referred to at 675 F.2d 774 would simply become $225,285.80, a value received still greater than the $195,065.72 surrendered.

in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, *or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death* . . . The two [taxes] are in pari materia and must be construed together.

"Accord, *Jewett v. Commissioner*, _____ U.S. _____, 102 S.Ct. 1082, 71 L.Ed.2d 170 (1982); *Burnet v. Guggenheim*, 288 U.S. 280, 286, 53 S.Ct. 369, 371, 77 L.Ed. 748, 751 (1933)."

(Emphasis added)

Thus, to support the Fifth Circuit's decision, it was essential for it to hold, and it did hold, erroneously, that had petitioner not released such power during her life, the wife's trust would have been included in her estate at her death. See 675 F.2d 779.

This holding was contrary to every other case (including three other circuits) which had considered the question. *Estate of Davis v. Commissioner*, 440 F.2d 896 (3rd Cir., 1970); *Commissioner v. Nelson*, 396 F.2d 519 (2nd Cir., 1968); *Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir., 1973); *Estate of Gertrude Friedman*, 40 T.C. 714 (1963); and *Estate of Robert Rodger Glen*, 45 T.C. 323 (1966) (full court). It is also believed to be contrary to the philosophy of prior Fifth Circuit authority. See *Vardell's Estate v. Commissioner*, 307 F.2d 688 (5th Cir., 1962) and *U.S. v. Gordon*, 406 F.2d 332 at 341 et seq., esp. footnote 15 (5th Cir., 1969).

The theory applicable in each of these cases, and in the present case, is that one who provides the consideration for a "transfer" is the "transferor" thereof. Under this landmark principle, the power which petitioner released in 1976 was not created by her. By election in 1972 to take under the will, she received benefits stipulated to be of greater value than she surrendered. She surrendered no net value, and thus made no gift, to any one by virtue of such election (and later release of powers). The principle is well established that when A makes a gift to B on condition that B make a gift to C, the entire gift to C (to the extent of the transfer from A to B) is from A, not B.[3]

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[3] *Reg. 25.2511-1(h)(2)*[4]; *Reg. 25.2511-1(h)(3)*; *Lehman v. Commissioner*, 109 F.2d 99 (2nd Cir., 1940), cert. den. 310 U.S. 637 (1940); *Estate of Dora N. Marshall*, 51 T.C. 696 at 701 (1969); *U.S. v. Stapf*, 375 U.S. 118 (1963); *Estate of Sparling v. Commissioner*, 552 F.2d 1340 (9th Cir., 1977); *Seaman v. U.S.*, 156 F.2d 719 (7th Cir., 1946); *Estate of Martha R. Campbell*, 59 T.C. 133 (last paragraph on page 136) (1972); *Marva Trotter Barrow Spaulding*, 27 T.C. 479 (1956) aff'd on other grounds sub nom *First National Bank of Chicago, Trustee v. Commissioner*, 255 F.2d 759 (7th Cir., 1958); *Augustus E. Staley*, 41 B.T.A. 752 (1940); *Schultz v. U.S.*, 33 A.F.T.R.2d 74-199 (4th Cir., 1974); and *Merten's Law of Federal Gift and Estate Taxation*, 1959 Ed., Vol. 5, § 34.34. These authorities implement the explicit statutory recognition of "indirect" gifts referred to in *Section 2511(a)*.

Clearly petitioner did not meet the basic requirement of ever having made a "transfer." See *Merten's Law of Federal Gift & Estate Taxation*, Chapters 20 (esp. sections 20.14 and 20.15) and 21 (esp. sections 21.01 and 21.06).

The origination of the present gift tax statute (Section 2501) was in Section 501 of the Revenue Act of 1932. The following provision was found in both the House and Senate Reports accompanying passage thereof:

With reference to Section 501

"The words 'transfer * * * by gift' and 'whether * * * direct or indirect' are designed to cover and comprehend all transactions . . . whereby and to the extent (section 503) that property or a property right is *donatively* passed to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example . . . (3) a transfer of property to B where there is imposed upon B the obligation of paying a commensurate annuity to C would be a gift to C; (4) the payment of money or the transfer of property to B in consideration whereof he is to render a service to C would constitute a gift to C or gifts both to B and to C depending on whether the service to be rendered by B to C was or

Under the so-called "widow's election will," such as the one here, the method of determining who the donor (or transferor) is is well established. That the term "adequate and full consideration in money or money's worth" has the same meaning in the gift tax provisions (e.g., Section 2512) as in the estate tax provisions (e.g., Sections 2036 and 2043) is clear. *Merrill v. Fahs*, 324 U.S. 308 (1945). It is similarly established that one put to an election under such a widow's election will receives "consideration" within the meaning of such estate and gift tax term; and that the estate and gift tax results are determined by reasoning that such widow gives (or transfers) a remainder interest in her own property (passing by such election) and receives such consideration in the form of a life estate[5] in the decedent's net property given therefor. *Commissioner v. Siegel*, 250 F.2d 339 (9th Cir., 1957); *Chase National Bank*, 25 T.C. 617 (1955), rev'd on

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was not an adequate and full consideration in money or money's worth for that which was received by B; . . ."

With reference to Section 503

"Since the tax is designed to reach all transfers to the extent that they are *donative*, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000."

(Emphasis added)

H. Rept. No. 708, 72nd Cong., 1st Sess. (1939-1 C.B., Part 2, 457 at 476) and *S. Rept. No. 665, 72nd Cong., 1st Sess.* (1939-1 C.B., Part 2, 496 at 524)

[4]All references to a Section number shall be to the Internal Revenue Code of 1954, and all references to "Reg." shall be to the Treasury Regulations issued thereunder, unless otherwise indicated. Such references shall be to such Code Sections or Regulations, as amended, and as in effect at the pertinent time hereunder, namely, August 27, 1972, or March 26, 1976.

[5]In the present case, she received an annuity based upon the value of the decedent's estate, rather than a life estate therein. The result is the same. See *U.S. v. Gordon*, 406 F.2d 332 at footnote 15 (5th Cir., 1969).

other grounds sub nom *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir., 1958); *Vardell's Estate v. Commissioner*, 307 F.2d 688 (5th Cir., 1962); *Estate of Isabelle M. Sparling*, 60 T.C. 330 (1973), rev'd on other grounds, 552 F.2d 1340 (9th Cir., 1977); *Estate of Emma Bressani*, 45 T.C. 373 (1966); and *Zillah Mae Turman*, 35 T.C. 1123 (1961).

Admittedly, those cases above[6] which petitioner alleges are contrary to the decision below dealt with "dominion and control" under what is now *Section 2036(a)(1)*, whereas the power held by petitioner would have been tested by *Section 2036(a)(2)*.[7] However, it is incredible that "dominion and control" should be excused in *Section 2036(a)(1)* and not in *Section 2036(a)(2)* when the former involves retention of a greater personal economic benefit than the latter. Clearly, *Section 2036(a)(2)* type powers do not preclude deductibility in income tax cases. *Winthrop v. Meisels*, 281 F.2d 694 (2nd Cir., 1940) and *W. D. O'Brien*, 46 T.C. 583 (1966) [this *O'Brien* case being cited for estate tax purposes by *Greer v. U.S.*, 448 F.2d 937 at 945 (4th Cir., 1971)].

The aggregation of both *Section 2036(a)(1)* and *2036(a)(2)* type powers is no different from having a single such power. The general principle of aggregation of powers being different from the separate powers them-

[6] *Estate of Davis v. Commissioner*, 440 F.2d 896 (3rd Cir., 1970); *Commissioner v. Nelson*, 396 F.2d 519 (2nd Cir., 1968), *Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir., 1973), *Estate of Gertrude Friedman*, 40 T.C. 714 (1963) and *Estate of Robert Rodger Glen*, 45 T.C. 323 (1966).

[7] Clearly, petitioner did not have the power to alter, amend or revoke under Section 2038 as suggested by the Fifth Circuit at 675 F.2d 773 and 774, footnote 12. Such a power would clearly have destroyed the measurability referred to at 675 F.2d 781, footnote 20. *Burnet v. Guggenheim*, 288 U.S. 280 (1933), cited at 675 F.2d 778, involved such a power to revoke.

selves was rejected under *Section 2036(a)(2)* in *Old Colony Trust Co. v. U.S.*, 423 F.2d 601 at 603 (1st Cir., 1970) (effectively overruling a prior contrary decision in such circuit), and in *U.S. v. Byrum*, 408 U.S. 125 (1972), esp. footnote 6. [The Court should not be misled by the holding in *Old Colony* that a separate power to designate beneficiaries nevertheless caused includability under *Section 2036(a)(2)*. The result in such case would have been the same had a life estate been retained, under *Section 2036(a)(1)*.]

So strong was the fascination of both lower courts with petitioner's "retention" of powers that they lost sight of the overriding, underlying purpose of the retention (i.e., dominion and control) provisions. They are designed to keep one who makes an estate-depleting "transfer" from enjoying a tax reduction therefrom if he has retained economic control over the gift. A "transfer" by the taxpayer is essential to taxation. (See footnote 3, especially following first paragraph.) The authorities overwhelmingly establish that the retention provisions have no application when there was no estate-depleting "transfer." By stipulation in this case, there was none. The following examples are illustrative:

> Situation 1 — A gives $10 to B on condition that B put $9 in a trust for A's children, C and D, from which trust B "retains," by agreement, a power to appoint such trust as between C and D.
>
> Situation 2 — A gives $10 to B on condition that B put $9 in a trust for A's children, C and D, from which trust B "retains," by agreement, a life estate.

In neither case has B done anything to deplete her estate, though literally she has "retained" dominion and control over the trust property. The situation is identical

in substance and result if B is eliminated from the transactional part, and A simply creates a trust for C and D giving B either a special power to appoint or a life estate, or both.

Since petitioner is not the one who created wife's trust, for the reasons above set out, no gift can be predicated upon the provisions of *Reg. 25.2511-2*, as was done by the Fifth Circuit at 674 F.2d 777, footnote 5. By its terms it applies only to a "donor," or one who has made a "transfer." See also the last sentence of *Reg. 25.2511-1(g)(1)*; and *Reg. 25.2511-1(h)* and *Reg. 25.2512-8*. By failing to recognize this, the lower courts are prospectively imposing a *double* transfer tax upon petitioner contrary to the philosophy of the clear policy implemented by the "full and adequate" consideration provisions of *Sections 2035-2038*, and by *Section 2043*.

For reasons cited in the courts below,[8] no gift tax can be predicated upon petitioner's release of power if such power is deemed created by her husband.

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[8]As to such a special and non-general power, there is no property interest other than the right to specify third party recipients. See *Estate of Steinman v. Commissioner*, 69 T.C. 804 at 809 (1978) and *Estate of Emma Bresani*, 45 T.C. 373 at 379 (1966). Congress has clearly excluded such powers from taxability since they fail to qualify as general powers of appointment under *Section 2514* (or *Section 2041*). *U.S. v. Field*, 255 U.S. 257 (1921) and *Merten's Law of Federal Gift and Estate Taxation*, 1959 Ed., Volume 5, §§ 34.10 and 34.11. Benefits flowing to third parties from the exercise of a special power of appointment, which exercise lowered the value of the exercising party's interest, have been held to emanate from the creator, and not the donee, of such power. See *Self v. U.S.*, 142 F. Supp. 939 (Ct. Cl., 1956) and *Commissioner v. Walston*, 168 F.2d 211 (4th Cir., 1948), affirming a divided Tax Court, 8 T.C. 72 (1947). See also *Reg. 25.2514-3(c), Example (3)*. *A fortiori*, no gift should result when the release of such power does not in any way reduce the benefits of the releasing party. The government has recently recognized this in *Revenue Ruling 79-327*, 1979-2 C.B. 342. In such ruling, it recognizes that a special power released by one to his own detriment is not taxable under *Section 2514*, but declines to follow *Self* and holds it taxable under *Section 2511*. By contrast, it properly holds that the release of such a special power, as here, results in no gift under *Section 2511*.

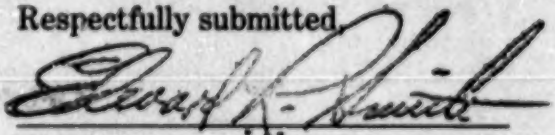
Summary

For the reasons, and based upon the authorities, set out above petitioner respectively seeks certiorari.

Appendix

An appendix, as required by Rule 21(k), is set out herein immediately following signature of counsel and certificate of service. The opinions below are set out therein (at A-1 and A-17) Original Signed By nal provisions, statutes and regulations required by Rule 21(f).

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that service of this Petition for Writ of Certiorari has been made by mailing three copies thereof on this 30th day of August, 1982, in an envelope with postage prepaid, properly addressed to the following parties:

Solicitor General
Department of Justice
Washington, D.C. 20530

M. Carr Ferguson
Assistant Attorney General
Tax Division
United States Department of Justice
Washington, D.C. 20530
Attn: Michael L. Paup
Chief, Appellate Section

Original Signed By

EDWARD R. SMITH

675 F.2d 774 (5th Cir., 1982)

MYRA B. ROBINSON, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 81-4078.

United States Court of Appeals,
Fifth Circuit.

May 14, 1982.

Taxpayer brought action against the Commissioner of Internal Revenue chal- [775] lenging imposition of gift tax upon her release of power of appointment over assets of trust formed four years earlier as a condition of her taking under her husband's will. The United States Tax Court held that the release constituted a taxable gift of remainder interest of the trust, and taxpayer appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) taxpayer's release of power of appointment completed transfer of the trust assets to the beneficiaries and constituted the taxable event under federal gift tax statute, and (2) consideration received by taxpayer at time she transferred her marital community property to the trust did not diminish her subsequent gift tax liability.

Affirmed.

1. Wills [Key] 782(3)

Texas law permits husband to make a conditional bequest to his wife, putting her to election of allowing

him to direct in his will disposition of her share of community property.

2. Internal Revenue [Key] 4200

Whether or not taxpayer received a quid pro quo from her deceased husband's bequest made under condition that taxpayer place her share of community property in a trust, her transfer of her interest in the marital community property to the trust pursuant to the will was not a completed gift to remaindermen at that time because she retained power to name new beneficiaries or change interests of the beneficiaries as between themselves; her release of her power of appointment four years later completed the transfer that constituted a taxable event under federal gift tax statute. 26 U.S.C.A. § 2512(b).

3. Internal Revenue [Key] 4200

Consideration received by taxpayer when, as a condition of taking under her husband's will, she placed her share of community property in a trust did not diminish her gift tax liability for wholly gratuitous release of her power of appointment four years later. 26 U.S.C.A. § 2512(b).

4. Statutes [Key] 223.2(29)

The estate and gift tax laws are to be applied in pari materia.

5. Internal Revenue [Key] 4149

Corpus of trust created by taxpayer as a condition of taking under her husband's will would have been

included in her gross estate had she died without releasing her power of appointment. 26 U.S.C.A. § 2036(a)(2).

Edward R. Smith, Lubbock, Tex., for petitioner.

M. Carr Ferguson, Glenn L. Archer, Jr., Asst. Attys. Gen., Michael L. Paup, Chief, Appellate Section, Richard Farber, Michael Roach, Attys., Tax Div., Dept. of Justice, Kenneth W. Gideon, Chief Counsel, I.R.S., Washington, D.C., for respondent.

Appeal from the Decision of the United States Tax Court.

Before CLARK, Chief Judge, RUBIN and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The husband of a Texas-domiciled taxpayer died in 1972, leaving a will that required his wife, as a condition of taking under the will, to elect to let his will direct the disposition of her share of the community property. The wife elected to take under the will, and, accordingly, she placed her share of the community property in a trust, reserving the income for life and retaining a power of appointment that permitted her to make gifts to her children, the surviving spouse of any deceased child, or to charity. Four years later the wife released the retained power of appointment. The Tax Court held that this release constituted a taxable gift of the remainder interest of the trust, and we affirm.

[1] The taxpayer, Myra B. Robinson, is the widow of G. R. Robinson, who died testate in 1972. The Robinsons had during their marriage accumulated a considerable amount of property. Under Texas community property law, Mrs. Robinson was the [776] owner of a present, vested one-half interest in the property acquired during the marriage.[1] When her husband died in 1972, her interest in their community property was not part of his gross estate for federal estate tax purposes.[2] Texas law, however, permits the husband to make a conditional bequest to his wife, putting her to the election of allowing him to direct in his will the disposition of her share of the community property. *Estate of Vardell v. Commissioner*, 307

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[1]Texas Fam. Code Ann. §§ 5.01, 5.22 (Vernon 1975); Johanson, Revocable Trusts, Widow's Election Wills, and Community Property: The Tax Problems, 47 Tex. L. Rev. 1247, 1263 (1969); *see United States v. Stapf*, 375 U.S. 118, 127, 84 S.Ct. 248, 255, 11 L.Ed.2d 195, 203 (1963); *Cooper v. Texas Gulf Indus.*, 513 S.W.2d 200, 201-202 (Tex. Sup. Ct. 1974); *Land v. Marshall*, 426 S.W.2d 841, 846 (Tex. Sup. Ct. 1968).

Although under prior Texas law, the husband exercised managerial control over the entire community, Tex. Rev. Civ. Stat. Ann. art. 4619 (Vernon 1936), he had no right of testamentary disposition over his wife's half of the property. The Texas Family Code was amended prior to Mrs. Robinson's election to provide that the personal earnings of each spouse and certain other categories of community property constitute sole management community property of the spouse whose property or efforts had created them, and all other community property was joint management community property. Tex. Fam. Code Ann. § 5.22 (Vernon 1975); *see Cooper v. Texas Gulf Indus.*, *supra* at 202. The rule that each spouse has a present, vested one-half ownership interest in the marital community was not changed by the amendment. *Id.*

[2]*Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 239 (5th Cir. 1958) (applying Texas law), *cert. denied*, 359 U.S. 913, 79 S.Ct. 589, 3 L.Ed.2d 575 (1959); Johanson, *supra* note 1, at 1267 ("Although the husband's will purports to dispose of the entire community interest in the assets, only the value of his one-half community share is includible in his gross estate.") (footnote omitted).

F.2d 688, 690 n.2 (5th Cir. 1962) ("The doctrine of election by the surviving spouse where the will deals with the entire community estate is well established under Texas law.").

Under the provisions of her husband's will, Mrs. Robinson was offered the choice of either accepting the benefits provided for her in the will and permitting the provisions of the will to control the disposition of her share of the community property, or receiving only a specific bequest of personal effects if she retained her one-half interest in the community property. Mrs. Robinson filed a timely election to take under the provisions of the will. Thereafter, her husband's executors transferred her share of the community property to a trust known as the "Myra B. Robinson Trust" (the "W trust") and the assets of her husband's estate, except his separately bequeathed personal effects, to a trust known as the "G. R. Robinson Estate Trust" (the "H trust"). Mrs. Robinson was to receive all of the net income from the W trust, plus an annuity from the H trust in the amount of four percent of its initial value, after deduction of debts, taxes and administrative expenses.

Under the W trust, in conformity with the will's provisions, Mrs. Robinson received the income for life, and she had the power to appoint during her life any part of the trust assets to any one or more of the children born of her marriage to G. R. Robinson, or to the surviving spouse of any deceased child, in such proportion as she might see fit. In addition, she had the power to appoint any part of the W trust during her life or by will to char-

ity, in such proportion as she might see fit.[3] On March 26, 1976, Mrs. Robinson released her power of appointment under this clause of the will. The value of the corpus of the W trust was then $881,601.38.

[777] The Commissioner determined that Mrs. Robinson's release of her power of appointment was a taxable gift of the remainder interest in the trust to the remaindermen named in the will of her husband. The Commissioner computed the value of this gift, based on Mrs. Robinson's age, to be $276,717.04.[4] Mrs. Robinson received no consideration for this 1976 release, so the entire value of the remainder interest at that time was treated as a taxable gift.

After the Commissioner issued a notice of gift tax deficiency, Mrs. Robinson petitioned the Tax Court for a redetermination of her gift tax liability. The Tax Court, 75 T.C. 346 (1980), held that (1) the 1976 release constituted a taxable gift, (2) the value of the gift was not

[3]The pertinent provision of the will provides, in relevant part:

> 6. During the life of my wife, she shall have the power, by recordable instrument delivered to the Trustee, to appoint any part or all of my wife's Trust free from such Trust to any one or more of our issue (or to the surviving spouse of any of our then deceased children) in such shares, manner and proportions as she shall see fit. In addition, my wife shall have the power, by recordable instrument delivered to the Trustee or by Will, to appoint any part or all of my wife's Trust free from such Trust to any one or more charities in such shares, manner and proportions as she shall see fit. Any such power described in this paragraph may be exercised only in a gratuitous way and not in a way which imposes any condition upon the recipient thereof. * * *

[4]Mrs. Robinson was born on December 20, 1919. The value of the corpus of the W trust on the date of the release was $881,601.38. The Commissioner multiplied this value by the remainder interest factor prescribed by Treas. Reg. § 25.2512-9(f), applicable to a single life, female, age 56, namely, .31388 to determine the value of the remainder interest in the W trust and hence the amount of the gift.

reduced under I.R.C. § 2512(b) by the interest Mrs. Robinson received in her husband's property in 1972, and (3) the powers held by Mrs. Robinson as trustee after her renunciation of the power of appointment did not give her sufficient dominion and control over the remainder interest in the W trust to render the gift incomplete. On this appeal from the Tax Court's decision, Mrs. Robinson does not challenge the third holding.

[2] Whether or not Mrs. Robinson received a quid pro quo from her husband's bequest, her 1972 transfer of her interest in the marital community property to the W trust was not a completed gift to the remaindermen at that time because Mrs. Robinson retained "the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves." Treas. Reg. § 25.2511-2(c)[5] "There can be no completed gift before the donor surrenders dominion and control of the subject matter of the gift." 4 J. Rabkin & M. Johnson, Federal Income, Gift and Estate Taxation § 51.04B(1) (1982).

[3] Although the parties stipulated in the Tax Court that the value of whatever Mrs. Robinson surrendered

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[5] *See also* Treas.Reg. § 25.2511-2(b); R. Stephens, G. Maxfield, S. Lind & D. Calfee, Federal Estate and Gift Taxation § 4.08[7][c] n.108 (4th ed. 1978) (giving a widow a special power of appointment over the remainder to her children would avoid any gift tax by the widow at the time of her election because her transfer would be incomplete for gift tax purposes); Halbach, The Community Property "Widow's Election" and Some of its Surprise Counterparts, 107 Tr. & Est. 108, 109 (1968) ("If [the widow] retains a general or special power of appointment, or other power which would normally render a transfer incomplete for gift tax purposes, no taxable gift will result unless and until the power is released or expires prior to the death of the widow.") (footnote omitted); Johanson, *supra* note 1, at 1310 ("reservation of the power makes the election transfer incomplete for gift tax purposes") (footnote omitted).

as a result of her election to take under her husband's will was less than the value of what she received under the will,[6] we do not rest our finding that there was no taxable gift in 1972 on I.R.C. § 2512(b).[7] If there was no taxable gift by Mrs. Robinson because she did not relinquish complete dominion and control over the trust property in 1972, I.R.C. § 2512(b), the section entitled, "Valuation of Gifts," cannot be applicable. Nor [778] is Mrs. Robinson entitled under § 2512 to any reduction in her 1976 gift tax liability for consideration received in 1972. Mrs. Robinson did receive an income interest in the H trust when she transferred her share of the community property to the W trust in 1972, but she received no consideration for her release of the power of appointment in 1976. The consideration received by Mrs. Robinson in 1972 does not diminish her gift tax liability for the wholly gratuitous release in 1976.

Therefore, the release by Mrs. Robinson of her power to change the beneficiaries and their relative portions of the remainder of the W trust in 1976 marked the cessa-

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[6] The parties stipulated in the Tax Court that the value of the W trust at the time of Mrs. Robinson's election was $731,741.94 and that the value of the H trust at that time (absent a disputed adjustment for interest) was $483,962.02. Mrs. Robinson contends that the value of what she gave up, her remainder interest in the W trust, was $195,089.72 ($731,741.94 × .26661 (Treas. Reg. § 25.2512-9(f)), and that is less than the value of what she received by the election, a 4% interest in the H trust with a present value of $236,622.58 ($483,962.02 × .04 × 12.2232) (Treas. Reg. § 25.2512-9(f)).

[7] I.R.C. § 2512(b) provides:

> Where property is transferred for less than adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar quarter.

tion of her dominion and control over the remainder of the trust and constituted a taxable gift. In an early case interpreting the gift tax laws, the Supreme Court reached a similar result. In *Burnet v. Guggenheim*, 288 U.S. 280, 53 S.Ct. 369, 77 L.Ed. 748 (1933), the Court held there was a taxable gift when the settlor of a trust who had reserved a power of revocation canceled the power. "If a revocable deed of trust is a present transfer by gift," the Court said, "There is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other. *Id.* at 285, 53 S.Ct. at 370, 77 L.Ed. at 750. The Court concluded, "[t]o lay the tax at once, while the deed is subject to the power, is to lay it on a gift that may never become consummate in any real or beneficial sense. To lay it later is to unite benefit with burden. We think the voice of Congress has ordained that this be done." *Id.* at 288, 53 S.Ct. at 372, 77 L.Ed. at 753. The Supreme Court reaffirmed this holding in *Sanford's Estate v. Commissioner*, 308 U.S. 39, 43, 60 S.Ct. 51, 56, 84 L.Ed. 20, 22-23 (1939), stating "a retention of control over the disposition of trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death."

Mrs. Robinson was the transferor of her share of the marital community property to the W trust. She was the settlor or creator of that trust and reserved a life income interest for herself and the special power of appointment over the remainder interest. Mrs. Robinson's retained

power to appoint the remainder of the W trust was in legal effect a power to alter or amend the trust and not a power to appoint. Treas.Reg. § 25.2514-1(b)(2), provides that "the term 'power of appointment' does not include powers reserved by a donor to himself."[8] As Professor Johanson has noted, "[s]ince the wife is regarded as the transferor of her share of the community property, her invasion power would be a reserved grantor power,"[9] hence of course rendering the gift incomplete.

If the power had not been created by Mrs. Robinson (or reserved by her for herself), it would have been a special power of appointment,[10] the release of which would

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[8] *Cf.* Treas.Reg. § 20.2041-1(b)(2) ("the term 'power of appointment' does not include powers reserved by the decedent to himself within the concept of sections 2036 through 2038").

[9] Johanson, *supra* note 1, at 1276 (footnote omitted). *Accord*, *id.* at 1267 (By choosing to allow the disposition of her community share to be controlled by the terms of her husband's will, the wife in effect makes a transfer of her interest to the trustee named in the will, under the trust terms provided therein.") (footnote omitted). Professor Johanson adds: "Consequently when the wife reserves what amounts to a general *inter vivos* power of appointment over the corpus of the W trust . . . the case should be treated the same as [a] case . . . in which the wife in terms reserves the power to revoke the trust. As in that situation, so also here the wife has not, by electing, presently agreed to give anybody anything. *Id.* at 1304-05. *Accord*, G. Bogert & G. Bogert, The Law of Trusts and Trustees § 282, at 312 (rev. 2d ed 1977) ("The gift tax powers of appointment section applies only to donated powers, those received by the holder from another, and not to powers reserved by a donor in making an inter vivos transfer, nor to the powers of an owner of an interest in property to dispose of his interest.") (footnote omitted).

[10] A general power of appointment means, with certain exceptions, "any power of appointment exercisable in favor of the person possessing the power . . . , his estate, his creditors, or the creditors of his estate." Treas.Reg. § 25.2514-1(c)(1). A special power of appointment is any power that is not a general power.

[779] not have been a taxable gift.[11] However, the power was created and held by her and it is not to be treated like a special power of appointment created by a donor and given to her.

[4, 5] Finally, Mrs. Robinson argues that the remainder interest in the W trust, over which she had a power of appointment,[12] would not have been included in her taxable estate at her death if the power had not been exercised, and that, therefore, its surrender during her life should not be taxable as a gift. Although Mrs. Robinson is correct in urging that the estate and gift tax laws are to be applied in pari materia,[13] we hold that the major premise of her argument is incorrect. The corpus of the W trust would have been included in Mrs. Robinson's

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[11]Treas. Reg. § 25.2514-3(e) provides the following example:

> The income is to be paid to L for life . . . . If in this example L had a power to cause the corpus to be distributed only to X, L would have a power of appointment which is not a general power of appointment, the exercise or release of which would not constitute a transfer of property for purposes of the gift tax.

[12]We will continue to refer to Mrs. Robinson's power to affect the enjoyment of the remainder interest in the trust as a power of appointment or special power of appointment, although as we have noted, the power is in effect a power to alter, amend, or revoke.

[13]In *Sanford's Estate v. Commissioner*, 308 U.S. 39, 44, 60 S.Ct. 51, 56, 84 L.Ed. 20, 23 (1939), the Court stated

> [t]here is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. . . . The two [taxes] are in pari materia and must be construed together.

Accord, Jewett v. Commissioner, ___ U.S. ___, 102 S.Ct. 1082, 71 L.Ed.2d 170 (1982); *Burnet v. Guggenheim*, 288 U.S. 280, 286, 53 S.Ct. 369, 371, 77 L.Ed. 748, 751(1933).

gross estate had she died without releasing her power of appointment.[14] In *Sanford's Estate v. Commissioner*, 308 U.S. 39, 43-44, 60 S.Ct. 51, 56, 84 L.Ed. 20, 22-23 (1939), the Supreme Court held,

> a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than [herself] is incomplete and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death.

Indeed, I.R.C. § 2036(a)(2) requires inclusion in the gross estate of "the value of all property to the extent of any interest therein of which the decedent has made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise under which he has retained for his life . . . the right . . . to designate the persons who shall possess or enjoy the property or the income therefrom."[15] In addition, I.R.C. § 2038 requires inclusion of "the value of all property . . . [t]o the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), . . . where the enjoyment thereof was subject at the date of death to any change through the

[14] *Estate of Vardell v. Commissioner*, 307 F.2d 688 (5th Cir., 1962), discussed by us *infra*, is not to the contrary. It held the corpus of the trust includable in the wife's estate but allowed an offset for the value of what she received under the election.

[15] *See also* I.R.C. § 2036(a)(2) requiring that the value of the gross estate include property the decedent has at any time transferred retaining a life estate.

exercise of a power . . . by the decedent . . . to alter, amend, revoke, or terminate." *See Estate of Vardell v. Commissioner*, 307 F.2d 688, 691 (5th Cir. 1962) (the community interest of the decedent would have been included in her gross estate because the "transfer by her to the remaindermen was not completed until her [780] death" under either I.R.C. § 2036 or I.R.C. § 2038).[16]

As a corollary to her argument based on an analogy to the estate tax laws, Mrs. Robinson urges that, even if the remainder interest in the W trust would be included in her estate at death, she would be entitled to the benefits of either the bona fide sale exceptions of § 2036 and § 2038, or the consideration offset in I.R.C. § 2043(a).[17] Therefore, Mrs. Robinson urges that the dominion and control provision of the estate tax laws do not dictate the determination of estate tax liability when adequate and full consideration was received at an earlier time for the interest now attempted to be included in the estate, relying on *Estate of Vardell v. Commissioner*, 307 F.2d 688, 694 (5th Cir. 1962). We there applied I.R.C. § 2043(a) "to permit credit for what [the widow] received in consideration of the transfer of the remainder in her community as against the value at her death of the property transferred." Thus, according to Mrs. Robinson,

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[16]The remainder interest was not, by definition, property *transferred* for a full and adequate consideration because, evidently, it was *not* transferred.

[17]I.R.C. § 2043(a) provides that for any transfer covered by §§ 2035-2038 that is made

> for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration . . . , there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received thereafter by the decedent.

even if she made a gift in 1976 because of the release of her power of appointment over the remainder in the W trust, she should have no gift tax liability because, as the parties stipulated, she received more property in 1972 than she gave up by reason of her election to take under the will.

This argument, however, misperceives the relationship between I.R.C. § 2043(a) and I.R.C. § 2512(b). I.R.C. § 2043(a) provides that, if a transfer is not a bona fide sale for adequate and full consideration, "there shall be included in the gross estate only the excess of the fair market value at the time of death . . . over the value of the consideration received therefor by the decedent." The provision requires the valuation of the consideration received by the decedent *at the time* the decedent made the transfer, a time that necessarily *predates* the decedent's death. Sections 2036(a) and 2038(a) also look to a time prior to the laying of the estate tax to determine if the transfer, at the time it ws made, was for adequate and full consideration.[18] These provisions were the basis for our allowance of the offset in *Estate of Vardell*, *supra*.

The gift tax, however, does not "value [the property] at a moment of time antecedent to the time when the gift became complete." *Goodman v. Commissioner*, 156 F.2d 218, 219 (2d Cir. 1946). Section 2512(b) implies that the consideration received at the moment of transfer of the

[18] I.R.C. § 2036(a) & 2038(a) both provide, in part: "The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has *at any time* made a transfer." (Emphasis added.) *But see* note 20, *infra*.

property is the consideration to be measured.[19] "[T]he statute and applicable Treasury Regulations impel the conclusion that taxable value for gift tax purposes is the value of the gift to the donor *at the moment it is made*." *Goodman*, 156 F.2d at 219 (emphasis added). In 1976, when the gift was made, Mrs. Robinson received no consideration. We cannot look to 1972 to find consideration for a wholly gratuitous release of a power four years later. We imply no opinion concerning whether, having released her power [781] over the remainder, the value of the remainder interest in the W trust included in Mrs. Robinson's estate will be offset by consideration received in 1972. That question is not now before us.[20]

Mrs. Robinson's release of her power of appointment in 1976 fixed the rights of the remaindermen and thus vested in them irrevocably what could otherwise have been snatched from them by a whim. It literally completed what had before been inchoate, a mere hope. It is this completed transfer that constitutes the taxable event under the federal gift tax statute.

The decision of the Tax Court is AFFIRMED.

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[19] I.R.C. § 2512(b) provides, in part: "Where property is *transferred for* less than adequate and full consideration . . . ." (Emphasis added.) Consideration offsets should, of course, be allowed in gift tax cases when the consideration was received contemporaneously with the transfer and when the donor did not retain sufficient dominion and control over the transferred property to make the gift incomplete for gift tax purposes. *See, e.g., Commissioner v. Siegel*, 250 F.2d 339, 344-45 (9th Cir. 1957).

[20] We note that various commentators have considered such a question. Professor Johanson suggests that on the widow's death she should not be entitled to a § 2043(a) consideration offset for the value she received at the time of the election if she did not at the time of the election "receive a measurable interest in her husband's property" or if she did not "transfer a measurable interest in her property to third persons." Johanson, *supra* note 1, at 1296. If a widow had the power to revoke the trust, then her

transfer of her interest in the marital community property to the W trust by electing to take under the will did

> not presently transfer a measurable interest to the remaindermen. Looking at the transaction at the time of her decision (which is the critical point of time in determining whether she has made a transfer for a consideration), there is no assurance that anything of value will pass to the remaindermen for the wife may revoke the trust. By electing, the wife has not agreed to give anybody anything. Whether the children will actually receive the remainder interest upon her death will turn on a subsequent event — namely, whether or not she revokes the trust. Her decision to exercise or to forego exercise of the revocation power will come in the future; this decision will not be made for a consideration.

Johanson, *supra* note 1, at 1303. *See also id.* at 1311-12 ("a consideration offset should be denied when the wife retains even a limited power of testamentary disposition"). Professor Johanson concludes his analysis by suggesting that a § 2043(a) "consideration offset should be limited to election-transfers for gift tax purposes." *Id.* at 1311. *Accord*, R. Stephens, G. Maxfield, S. Lind, D. Calfee, *supra* note 5, at ¶ 4.08[7][c] n.108 (If at the time of the widow's election she did not make a completed gift, "the bargain or exchange aspect of the widow's election seems to disappear and the creation of the trust may involve only a straight bequest by the husband and a concurrent transfer by the wife to the trust for no consideration. Lack of consideration for her transfer would increase the amount included in her estate."). *But see Estate of Vardell v. Commissioner*, 307 F.2d 388, 694 (5th Cir. 1962) (allowing consideration offset to reduce amount included in estate even though wife had control over the property until she died).

75 T.C. 346 (1980)

MYRA B. ROBINSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 2384-79.

Filed December 8, 1980.

In 1972, petitioner elected to let her husband's will direct the disposition of her community property share. As a result, petitioner's community share became the corpus of the W trust. Petitioner is the trustee and income beneficiary of the W trust and held the limited powers to appoint its corpus which she released in 1976. *Held*, petitioner's 1976 release of her limited powers to appoint W trust corpus is a taxable gift of the remainder interest in her community share. *Held, further*, the value of the gift is not reduced under sec. 2512(b), I.R.C. 1954, by the interest petitioner received in her husband's property in 1972. *Held, further*, the powers held by petitioner as trustee of the W trust do not give her dominion and control sufficient to render the gift incomplete.

Edward R. Smith, for the petitioner.
Glenn D. Wilkinson, for the respondent.

OPINION

FAY, *Judge:* Respondent determined a deficiency of $58,676.97 in petitioner's Federal gift tax for the calendar quarter ending March 31, 1976. The issues for decision are whether petitioner made a taxable gift when she released certain powers held by her over a trust, and, if a gift was made, what was its value.

All of the facts have been stipulated and are so found.

Petitioner, Myra B. Robinson, resided in Big Spring, Tex., when she filed her petition herein. Petitioner was married to G. R. Robinson (hereinafter husband) who died testate on February 27, 1972. His will gave petitioner a choice — she could elect to let [347] her husband's will direct the disposition of her share of their community property and take fully under the will or she could retain her right to freely dispose of her community property share and take only a specific bequest of personal effects under the will. On August 22, 1972, petitioner filed an election with the County Court of Howard County, Tex., to accept the will's direction of the disposition of her community share. Neither party contests the validity or the binding effect of such election.

Pursuant to her election and her husband's will, petitioner's community property share became the corpus of the "Myra B. Robinson Trust" (hereinafter wife's trust) while her husband's interest in the community and any separate property he may have owned which was not specifically bequeathed were placed in the "G. R. Robinson Estate Trust" (hereinafter husband's trust). The terms of the wife's trust provide petitioner with a right to all the net income of that trust for life, while under the

husband's trust she has a right to an annual amount from that trust equal to 4 percent of the initial corpus. Upon petitioner's death, the corpora of the two trusts are to be combined and then divided into equal shares for certain descendants of petitioner and her deceased husband. Petitioner is trustee of both trusts.[1]

As trustee of both trusts, petitioner has broad powers of management including powers to sell, exchange, pledge, or encumber the trusts; to invest in any property whatsoever, including wasting assets; and to make oil, gas, or mineral leases. Generally she can deal with the trusts as if she were the fee simple owner, and the terms of both trusts provide that they are to be construed in favor of the validity of any act or omission by petitioner as trustee. Petitioner, as trustee, also has the power in her discretion to allocate revenues, receipts, proceeds, disbursements, expenses, deductions, accruals, and losses of each trust between corpus and income. Her allocation need not be in accord with the Texas Trust Act, Tex. Civ. Code Ann. tit. 125A, art. 7425b-1 et seq. (Vernon 1960), which controls only if she does not exercise her power. In addition, she may distribute from either trust (looking to the wife's trust first) amounts necessary to [348] maintain her standard of living if the mandatory distributions are not sufficient to do so.

Apart from her powers as trustee, petitioner had the following powers over the wife's trust:

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[1]The First National Bank of Midland (Texas) was named as cotrustee, but its sole duty as such was to exercise all rights pertaining to life insurance contracts on the husband's or individual trustee's life. The bank would become a full cotrustee if petitioner remarried. She has not done so.

> During the life of my wife, she shall have the power, by recordable instrument delivered to the Trustee, to appoint any part or all of my wife's Trust free from such Trust to any one or more of our issue (or to the surviving spouse of any of our then deceased children) in such shares, manner and proportions as she shall see fit. In addition, my wife shall have the power, by recordable instrument delivered to the Trustee or by Will, to appoint any part or all of my wife's Trust free from such Trust to any one or more charities in such shares, manner and proportions as she shall see fit. Any such power described in this paragraph may be exercised only in a gratuitous way and not in a way which imposes any condition upon the recipient thereof. * * *

Thus, petitioner could appoint any part of the wife's trust to designated appointees or to qualifying charities. On March 26, 1976, petitioner executed a valid release of these appointment powers.

When the wife's trust was created, its value was $731,741.94, and when petitioner released her powers to appoint corpus, its value was $881,601.38. The husband's trust had a value of $483,962.02 when it was created.[2] Petitioner was born on December 20, 1919.

In his statutory notice of deficiency, respondent asserted a gift tax deficiency of $58,676.97 based on his determination that, when petitioner released her powers to appoint, she made a taxable gift of the remainder in the wife's trust corpus (her community property share).

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[2]Respondent contends the value of the husband's trust should be reduced by $23,176.19 to represent interest on Federal estate tax and interest and penalties on State inheritance tax paid by G. R. Robinson's estate. In light of our holding, *infra*, that, although completed gift was made, petitioner is not entitled to a consideration offset, we need not address that contention.

The issue presented is whether petitioner's release of certain powers in a testamentary trust, created under her husband's will but funded with her share of community property, constituted a taxable gift under section 2512(a).[3] Respondent contends a gift was made and computes its value as follows: $881,601.38 (value of wife's trust on date of the release) × 0.31388 (factor for [349] remainder interest per sec. 25.2512-9(f), Table A(2), Gift Tax Regs.) = $276,717.04. Petitioner contends the release did not constitute a taxable gift because she was neither the donor of the trust nor the creator of the powers. Alternatively, petitioner argues that if she is treated as the transferor to the wife's trust, she received adequate and full consideration in money or money's worth in the form of her interest in the husband's trust. We find for respondent.

Petitioner first contends that she is the donee of special powers of appointment under her husband's will citing *Self v. United States*, 135 Ct. Cl. 371, 142 F. Supp. 939 (1956), and *Commisioner v. Walston*, 168 F.2d 211 (4th Cir. 1948), affg. 8 T.C. 72 (1947), for the proposition that exercise of powers of appointment by the donee of the powers is not a gift. However, in this case petitioner is not the donee of her powers, rather she retained the powers when she transferred her community share to the wife's trust.

In *Siegel v. Commissioner*, 26 T.C. 743 (1956), affd. 250 F.2d 339 (9th Cir. 1957), a surviving widow elected to accept the disposition of her interest in community property according to her husband's will and received a

[3] All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

life estate in the entire community. We held that the electing widow made a taxable gift of the remainder interest in her community share to the extent (if any) its value exceeded the value of the interest she received in her husband's community share. In other words, she was treated as transferring the remainder in her community share in exchange for a life estate in her deceased husband's community share.[4] In this case, petitioner, like the surviving widow in *Siegel*, received an interest in her husband's property in exchange for transferring her community share into the wife's trust. Thus, we have no problem concluding that petitioner was the transferor of her community share. See also *Lehman v. Commissioner*, 109 F.2d 99 (2d Cir. 1940), affg. 39 B.T.A. 17 (1939), cert. denied 310 U.S. 637 (1940).

Nor do we have any problem concluding that the limited powers to appoint corpus are interests petitioner retained when she made the transfer. Such is clear from an analysis of the [350] widow's election cases arising under section 2036. See *Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir. 1973), affg. 54 T.C. 493 (1970); *Vardell's Estate v. Commissioner*, 307 F.2d 688 (5th Cir. 1962), revg. 35 T.C. 50 (1960). *Vardell* involved the estate of a widow who elected to accept the disposition of her community property share according to her husband's will and received a life estate in the entire community. We held that, upon her death, the entire date of death value of her community share was included in her gross estate under section 2036 since she had

[4] In *Siegel v. Commissioner*, 26 T.C. 743 (1956), affd. 250 F.2d 339 (9th Cir. 1957), the amount of the gift was reduced by a $35,000 specific bequest made to the widow-taxpayer under her husband's will.

transferred her share but *retained* a life interest. The Fifth Circuit Court of Appeals reversed only to the extent that the included value should be reduced under section 2043(a) by the date of transfer value of her life interest in her husband's community share since it was consideration in money or money's worth for the transfer. The value of the widow's life interest in her own community share was not consideration because that was an interest she retained, not one that was transferred to her. The above analysis applies to petitioner's limited powers of appointment as well. They are powers she retained when the trust was created. In summary, we find that petitioner transferred her community share to the wife's trust but retained limited powers to appoint that trust's corpus.

Petitioner's second contention is that even if she was the transferor of her community share, she received adequate and full consideration in money or money's worth since the interest she received in the husband's trust was greater in value than the remainder interest in her community property when she elected to accept her husband's will. In *Turman v. Commissioner*, 35 T.C. 1123 (1961), we held that, if the interest an electing widow receives in her husband's property exceeds the value of what she relinquishes, no taxable gift is made. See sec. 2512(b). However, in *Turman* the electing widow actually parted with the remainder in her community share. In this case, petitioner did not part with the remainder interest in her community share when the trust was created. She still controlled it via her powers of appointment. We are willing to accept that the interest petitioner received in her husband's property was in

exchange for the transfer of her community share to the wife's trust, but that transfer was very limited. Petitioner retained a life income interest and limited powers of appointment. She gave up very little, and what she received cannot be viewed as full and [351] adequate consideration for the completed transfer of her remainder interest simply because she did not transfer it. Thus, we conclude that petitioner did not receive adequate and full consideration for the transfer of the remainder in her community share when she elected to accept her husband's will.

Given our findings that petitioner transferred her community share to the wife's trust and retained limited powers of appointment, we must evaluate the effect of petitioner's release of those limited powers of appointment. The essence of a completed gift is the relinquishment of dominion and control by the transferor. Sec. 25.2511-2(b), Gift Tax Regs. When petitioner's release became effective, she no longer could alter the beneficial interests of the remainder interest in her community share. She relinquished dominion and control, and the transfer of the remainder became complete.[5] See generally *Latta v. Commissioner*, 212 F.2d 164 (3d Cir. 1954), affg. a Memorandum Opinion of this Court, cert. denied 348 U.S. 825 (1954); sec. 25.2512-2, Gift Tax Regs.

A gift is valued at the time it is completed (sec. 25.2512-1, Gift Tax Regs.), and the value of the remainder interest in petitioner's community share when she

[5]Since releasing her powers to appoint, petitioner has only a life income interest in the wife's trust and powers as trustee to administer the trusts and to distribute to herself amounts necessary to maintain her standard of living.

released her limited powers to appoint was $276,717.04. That is the amount of the gift unless petitioner received some offsetting consideration. See sec. 2512(b). Petitioner asserts that the interest in her husband's community share which she received should offset the value of the remainder in her community share which passed beyond her control when she released her powers to appoint. We cannot agree.

Section 2512(b) provides:

> (b) Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar quarter.

It is apparent from the language of section 2512(b) that the amount of a gift is reduced only by consideration received for the transfer which constitutes the gift. At the time of her [352] husband's death, petitioner received a limited life interest in her husband's property in exchange for transferring her community share into the wife's trust subject to the powers she retained. She received the interest in her husband's property regardless of whether she just held the appointment powers, exercised them, or released them. She received nothing for later releasing her powers to appoint. Petitioner's transfer of her community share to the wife's trust and the release of her limited powers to appoint are two separate transfers. We see no reason why consideration for transfer of one interest should serve as consideration for another separate transfer. See generally *Estate of Stein-*

man v. Commissioner, 69 T.C. 804 (1978). Thus, we conclude that the amount of petitioner's gift of the remainder in her community share cannot be reduced by the value of the interest she received in her husband's property.

We feel some sympathy for petitioner's position. If she had been able to retain only a life estate in her community share when she elected, no gift would have been made and no part of her community share would be includable in her gross estate under section 2036 since the date of election value of her interest in her husband's community share exceeded the date of election value of the remainder interest in her community share. But she retained more. Even though the net effect of her release was the same as if she had never had the power, the fact remains that she did have it. The result may be unfortunate, but it is unavoidable.

We have held that petitioner made a completed taxable gift of the remainder interest in her community property share when she released limited powers to appoint that share. Normally our inquiry would end at that point. However, the broad powers held by petitioner as trustee of both trusts merit discussion.

Petitioner, as trustee of both trusts, has broad powers of management including powers to sell, exchange, pledge, or encumber the trusts and to invest in any property whatsoever including wasting assets. She also has the power in her discretion to allocate revenues, receipts, proceeds, disbursements, expenses, deductions, accruals, and losses of each trust between corpus and income. Petitioner is the income beneficiary of the

wife's trust, the corpus of which is her community share. If she could use her administrative powers as trustee to divert the wife's trust corpus to herself, she could still control the [353] amount of the remainder interest, and a purported gift of the remainder would not be complete. For example, she could by either selling the assets and allocating all gain to income or by investing solely in wasting assets divert the entire corpus to herself as income beneficiary. Therefore, a remaining issue is whether the administrative powers held by petitioner are sufficiently broad to give her continuing dominion and control.

While the administrative powers given petitioner are broadly written, they must be examined in light of the testator's intent and the applicable State law to determine if they really are unlimited. See generally *Greer v. United States*, 448 F.2d 937 (4th Cir. 1971); *Miami Beach First National Bank v. United States*, 443 F.2d 116 (5th Cir. 1971); *Old Colony Trust Co. v. United States*, 423 F.2d 601 (1st Cir. 1970); *Estate of Speer v. Commissioner*, 57 T.C. 804 (1972); *Atwell v. United States*, 339 F. Supp. 425 (S.D. Tex. 1972); *Doss v. United States*, 326 F. Supp. 1320 (N.D. Tex. 1971).[6] The trust in this case must be evaluated under Texas law. See *Wilson v. Smith*, 373 S.W.2d 514 (Tex. Civ. App. 1963), cert. denied 379 U.S. 973 (1965). The Texas Trust Act, Tex. Civ. Code Ann. tit

[6] See also *Gardiner v. United States*, 458 F.2d 1265 (9th Cir. 1972); *Rand v. United States*, 445 F.2d 1166 (2d Cir. 1971); *Peoples Trust Co. of Bergen County v. United States*, 444 F.2d 193 (3d Cir. 1971); *Florida Bank at Lakeland v. United States*, 443 F.2d 467 (5th Cir. 1971); *First National Bank in Palm Beach v. United States*, 443 F.2d 480 (5th Cir. 1971); *United States v. Powell*, 307 F.2d 821 (10th Cir. 1962); *Estate of King v. Commissioner*, 37 T.C. 973 (1962). Cf. *Estate of Rolin v. Commissioner*, 68 T.C. 919 (1977), affd. 588 F.2d 368 (2d Cir. 1978).

125A, art. 7425b-1 et seq. (Vernon 1960), provides rules for the administration of trusts; however, it operates only to supplement rather than to supplant an express trust's terms. *St. Marks Episcopal Church v. Lowry*, 271 S.W.2d 681 (Tex. Civ. App. 1954). Therefore, broad powers to sell, invest, and allocate are not contrary to that Act, but that alone does not give petitioner unbridled discretion.

The wife's trust contains no broad exculpatory clause releasing petitioner from her obligations as a fiduciary or holding her harmless for any mismanagement. See *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521 (Tex. Civ. App. 1977).[7] As the [354] Texas Supreme Court said in *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786 (1938):

> When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct toward the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. [132 Tex. at 152, 120 S.W.2d at 788.]

Thus, petitioner owes a duty to treat the remaindermen fairly — she cannot use the administrative powers to deplete corpus to their detriment without violating her fiduciary duties. *Doss v. United States*, 326 F. Supp. 1320 (N.D. Tex. 1971). See also *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. Civ. App. 1967); *Thorman v. Carr*, 408

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[7] The only exculpatory language in G. R. Robinson's will relieves petitioner from liability for loss or depreciation in estate or trust property unless such loss or depreciation is due to gross neglect, bad faith, or fraud. This is not the same as broad language relieving a trustee for *any* act or omission. See *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521 (Tex. Civ. App. 1977).

S.W.2d 259 (Tex. Civ. App. 1966); *Nathan v. Hudson*, 376 S.W.2d 856 (Tex. Civ. App. 1964). As previously noted, petitioner is not only the trustee, but she is also the income beneficiary. A depletion of corpus to increase the income interest would directly benefit her. In Texas, a trustee is not permitted to benefit from her own actions at the expense of the trust or let her self-interest conflict with her fiduciary obligations. *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377 (1945). See generally *Dickson v. Dickson*, 544 S.W.2d 200 (Tex. Civ. App. 1976); *Nathan v. Hudson, supra*. We do not believe a Texas court of equity would permit petitioner to exercise her administrative powers in a manner detrimental to the remaindermen.

Our analysis of the scope of petitioner's administrative powers conforms with the testator's intent which is the touchstone in construction of will and testamentary trust provisions in Texas. See *Bradford v. Rain*, 562 S.W.2d 514 (Tex. Civ. App. 1978). A will must be construed in its entirety giving due regard to all its provisions and not just to isolated parts. *Doss v. United States, supra; Houston v. Harberger*, 377 S.W.2d 673 (Tex. Civ. App. 1964). Petitioner was the trustee and the income beneficiary. She held broad administrative powers, limited powers to appoint, and a power to invade to maintain her standard of living. Had the testator intended her to be able to manipulate the administrative powers to give herself the lion's share of the trust, her power to invade only for her maintenance and the limits on her powers to appoint would be mere verbiage. Reading the will as a whole, it is clear that the testator intended petitioner to have powers broad enough to do almost anything with

the wife's trust corpus *except* give it all to herself. Thus, we conclude that petitioner was given broad powers as trustee to ease administra-[355]tion but not to allow her by unbridled administrative acts to endanger the remainder interests. See generally *Estate of Pardee v. Commissioner*, 49 T.C. 140 (1967). In short, petitioner's powers as trustee do not give her sufficient dominion and control to render the gift of the remainder in her community share incomplete.

To reflect the foregoing,

Decision will be entered for the respondent.

STATUTES, RULES, AND REGULATIONS

U. S. CONSTITUTION Article 3

* * *

Section 2, Clause 2. Supreme Court, Original and Appellate Jurisdiction

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

SUPREME COURT RULE 17

Rule 17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

28 U.S.C. 1254

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

REVENUE ACT of 1932

Sec. 501. Imposition of tax.

Sec. 501. (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

Sec. 501. (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

Sec. 501. (c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

Sec. 503. Transfer for less than adequate and full consideration.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

INTERNAL REVENUE CODE OF 1954

SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) Application of General Rule. — If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

SEC. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) General Rule. — The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death —

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

(b) Limitation on Application of General Rule. — This section shall not apply to a transfer made before March

4, 1931; nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

SEC. 2037. TRANSFERS TAKING EFFECT AT DEATH.

(a) General Rule. — The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if —

(1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and

(2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms or the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

(b) Special Rules. — For purposes of this section, the term "reversionary interest" includes a possibility that property transferred by the decedent —

(1) may return to him or his estate, or

(2) may be subject to a power of disposition by him,

but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the

death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary or his delegate. In determining the value of a possibility that property may be valued as if it were a possibility that such property may return to the decedent or his estate. Notwithstanding the foregoing, an interest so transferred shall not be included in the decedent's gross estate under this section if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a general power of appointment (as defined in section 2041) which in fact was exercisable immediately before the decedent's death.

SEC. 2038. REVOCABLE TRANSFERS.

(a) In General. — The value of the gross estate shall include the value of all property —

(1) Transfers after June 22, 1936. — To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

(2) Transfers on or before June 22, 1936. — To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph.

(b) Date of Existence of Power. — For purposes of this section, the power to alter, amend, revoke, or terminate shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, revocation, or termination takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose, if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

(c) Effect of Disability in Certain Cases.

* * *

SEC. 2041. POWERS OF APPOINTMENT.

(a) In General. — The value of the gross estate shall include the value of all property —

(1) Powers of appointment created on or before October 21, 1942. —

* * *

(2) Powers created after October 21, 1942. — To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

(3) Creation of another power in certain cases. — To the extent of any property with respect to which the decedent —

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under section 2035, 2036, or 2037, exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

(b) Definitions. — For purposes of subsection (a) —

(1) General power of appointment. — The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

(B) A power of appointment created on or before October 21, 1942, which is exercisable by the decedent only in conjunction with another person shall not be deemed a general power of appointment.

(C) In the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person—

(i) If the power is not exercisable by the decedent except in conjunction with the creator of the

power—such power shall not be deemed a general power of appointment.

(ii) If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent—such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

(iii) If (after the application of clauses (i) and (ii)) the power is a general power of appointment and is exercisable in favor of such other person—such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.

For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

* * *

SEC. 2043. TRANSFERS FOR INSUFFICIENT CONSIDERATION.

(a) In General. — If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

(b) Marital Rights Not Treated as Consideration. — For purposes of this chapter, a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

SEC. 2501. IMPOSITION OF TAX.

(a) Taxable Transfers. —

(1) General rule. — For the first calendar quarter of calendar year 1971 and each calendar quarter thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar quarter by any individual, resident or nonresident.

* * *

SEC. 2511. TRANSFERS IN GENERAL.

(a) Scope. — Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

SEC. 2512. VALUATION OF GIFTS.

(a) If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

(b) Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar quarter.

SEC. 2514. POWERS OF APPOINTMENT.

(a) Powers Created on or Before October 21, 1942.

(b) Powers Created After October 21, 1942. — The exercise or release of a general power of appointment created after October 21, 1942, shall be deemed a transfer of property by the individual possessing such power. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power.

(c) Definition of General Power of Appointment. — For purposes of this section, the term "general power of appointment" means a power which is exercisable in favor of the individual possessing the power (hereafter in this subsection referred to as the "possessor"), his

estate, his creditors, or the creditors of his estate; except that —

(1) A power to consume, invade, or appropriate property for the benefit of the possessor which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the possessor shall not be deemed a general power of appointment.

(2) A power of appointment created on or before October 21, 1942, which is exercisable by the possessor only in conjunction with another person shall not be deemed a general power of appointment.

(3) In the case of a power of appointment created after October 21, 1942, which is exercisable by the possessor only in conjunction with another person —

(A) if the power is not exercisable by the possessor except in conjunction with the creator of the power — such power shall not be deemed a general power of appointment;

(B) if the power is not exercisable by the possessor except in conjunction with a person having a substantial interest, in the property subject to the power, which is adverse to exercise of the power in favor of the possessor — such power shall not be deemed a general power of appointment. For the purposes of this subparagraph a person who, after the death of the possessor, may be possessed of a power of appointment (with respect to the property subject to the possessor's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the possessor's

power;

(C) if (after the application of subparagraphs (A) and (B)) the power is a general power of appointment and is exercisable in favor of such other person — such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the possessor) in favor of whom such power is exercisable.

For purposes of subparagraphs (B) and (C), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

TREASURY REGULATIONS

§ 25.2511-1 Transfers in general

* * *

(g) (1) Donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor. However, there are certain types of transfers to which the tax is not applicable. It is applicable only to a transfer of a beneficial interest in property. It is not applicable to a transfer of bare legal title to a trustee. A transfer by a trustee of trust property in which he has no beneficial interest does not constitute a gift by the trustee (but such a transfer may constitute a gift by the creator of the trust, if until the transfer he had the power to change the beneficiaries by amending

or revoking the trust). The gift tax is not applicable to a transfer for a full and adequate consideration in money or money's worth, or to ordinary business transactions, described in § 25.2512-8.

* * *

(h) The following are examples of transactions resulting in taxable gifts and in each case it is assumed that the transfers were not made for an adequate and full consideration in money or money's worth:

(1) A transfer of property by a corporation to B is a gift to B from the stockholders of the corporation. If B himself is a stockholder, the transfer is a gift to him from the other stockholders but only to the extent it exceeds B's own interest in such amount as a shareholder. A transfer of property by B to a corporation generally represents gifts by B to the other individual shareholders of the corporation to the extent of their proportionate interests in the corporation. However, there may be an exception to this rule, such as a transfer made by an individual to a charitable, public, political or similar organization which may constitute a gift to the organization as a single entity, depending upon the facts and circumstances in the particular case.

(2) The transfer of property to B if there is imposed upon B the obligation of paying a commensurate annuity to C is a gift to C.

(3) The payment of money or the transfer of property to B in consideration of B's promise to render a service to C is a gift to C, or to both B and C, depending on whether the service to be rendered to C is or is not an adequate and full consideration in money or money's worth for that which is received by B. See sec-

tion 2512(b) and the regulations thereunder.

(4) If A creates a joint bank account for himself and B (or a similar type of ownership by which A can regain the entire fund without B's consent), there is a gift to B when B draws upon the account for his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to A. Similarly, if A purchases a United States savings bond registered as payable to "A or B," there is a gift to B when B surrenders the bond for cash without any obligation to account for a part of the proceeds to A.

(5) If A with his own funds purchases property and has the title conveyed to himself and B as joint owners, with rights of survivorship (other than a joint ownership described in example (4)) but which rights may be defeated by either party severing his interest, there is a gift to B in the amount of half the value of the property. However, see § 25.2515-1 relative to the creation of a joint tenancy (or tenancy by the entirety) between husband and wife in real property with rights of survivorship which, unless the donor elects otherwise is not considered as a transfer includible for Federal gift tax purposes at the time of the creation of the joint tenancy. See § 25.2515-2 with respect to determining the extent to which the creation of a tenancy by the entirety constitutes a taxable gift if the donor elects to have the creation of the tenancy so treated. See also § 25.2523(d)-1 with respect to the marital deduction allowed in the case of the creation of a joint tenancy or a tenancy by the entirety.

(6) If A is possessed of a vested remainder interest in property, subject to being divested only in the event

he should fail to survive one or more individuals or the happening of some other event, an irrevocable assignment of all or any part of his interest would result in a transfer includible for Federal gift tax purposes. See especially paragraph (e) of § 25.2512-5 for the valuation of an interest of this type.

(7) If A, without retaining a power to revoke the trust or to change the beneficial interests therein, transfers property in trust whereby B is to receive the income for life and at his death the trust is to terminate and the corpus is to be returned to A, provided A survives, but if A predeceases B the corpus is to pass to C, A has made a gift equal to the total value of the property less the value of his retained interest. See paragraph (e) of § 25.2512-5 for the valuation of the donor's retained interest.

(8) If the insured purchases a life insurance policy, or pays a premium on a previously issued policy, the proceeds of which are payable to a beneficiary or beneficiaries other than his estate, and with respect to which the insured retains no reversionary interest in himself or his estate and no power to revest the economic benefits in himself or his estate or to change the beneficiaries or their proportionate benefits (or if the insured relinquishes by assignment, by designation of a new beneficiary or otherwise, every such power that was retained in a previously issued policy), the insured has made a gift of the value of the policy, or to the extent of the premium paid, even though the right of the assignee or beneficiary to receive the benefits is conditioned upon his surviving the insured. For the valuation of life insurance policies see § 25.2512-6.

(9) Where property held by a husband and wife as community property is used to purchase insurance upon the husband's life and a third person is revocably designated as beneficiary and under the State law the husband's death is considered to make absolute the transfer by the wife, there is a gift by the wife at the time of the husband's death of half the amount of the proceeds of such insurance.

(10) If under a pension plan (pursuant to which he has an unqualified right to an annuity) an employee has an option to take either a retirement annuity for himself alone or a smaller annuity for himself with a survivorship annuity payable to his wife, an irrevocable election by the employee to take the reduced annuity in order that an annuity may be paid, after the employee's death, to his wife results in the making of a gift. However, see section 2517 and the regulations thereunder for the exemption from gift tax of amounts attributable to employers' contributions under qualified plans and certain other contracts. As amended T.D. 6542, Jan. 20, 1961, 26 F.R. 548.

§ 25.2511-2 Cessation of donor's dominion and control

(a) The gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the iden-

tity of the donee may not then be known or ascertainable.

(b) As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined. For example, if a donor transfers property to another in trust to pay the income to the donor or accumulate it in the discretion of the trustee, and the donor retains a testamentary power to appoint the remainder among his descendants, no portion of the transfer is a completed gift. On the other hand, if the donor had not retained the testamentary power of appointment, but instead provided that the remainder should go to X or his heirs, the entire transfer would be a completed gift. However, if the exercise of the trustee's power in favor of the grantor is limited by a fixed or ascertainable standard (see paragraph (g) (2) of § 25.2511-1), enforceable by or on behalf of the grantor, then the gift is incomplete to the extent of the ascertainable value of any rights thus retained by the grantor.

(c) A gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete if and

to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard. Thus, if an estate for life is transferred but, by an exercise of a power, the estate may be terminated or cut down by the donor to one of less value, and without restriction upon the extent to which the estate may be so cut down, the transfer constitutes an incomplete gift. If in this example the power was confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

(d) A gift is not considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to the donee at the termination of the period, constitutes a completed gift.

(e) A donor is considered as himself having a power if it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, as such, is not a person having an adverse interest in the disposition of the trust property or its income.

(f) The relinquishment or termination of a power to change the beneficiaries of transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. For example, if A transfers property in trust for the benefit of B and C but reserves the power as trustee to change the proportionate interests of B and C, and if A thereafter has another person appointed trustee in place of himself, such later relinquishment of the power by A to the new trustee completes the gift of the transferred property, whether or not the new trustee has a substantial adverse interest. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the initial transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the power, and constitutes a gift of such income or of such other enjoyment taxable as of the calendar year of its receipt. If property is transferred in trust to pay the income to A for life with remainder to B, powers to distribute corpus to A, and to withhold income from A for future distribution to B, are powers to change the beneficiaries of the transferred property.

(g) If a donor transfers property to himself as trustee (or to himself and some other person, not possessing a substantial adverse interest, as trustees), and retains no beneficial interest in the trust property and no power over it except fiduciary powers, the exercise or nonexercise of which is limited by a fixed or ascertainable stan-

dard, to change the beneficiaries of the transferred property, the donor has made a completed gift and the entire value of the transferred property is subject to the gift tax.

(h) If a donor delivers a properly endorsed stock certificate to the donee or the donee's agent, the gift is completed for gift tax purposes on the date of delivery. If the donor delivers the certificate to his bank or broker as his agent, or to the issuing corporation or its transfer agent, for transfer into the name of the donee, the gift is completed on the date the stock is transferred on the books of the corporation.

(j) If the donor contends that a power is of such nature as to render the gift incomplete, and hence not subject to the tax as of the calendar year of the initial transfer, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument of transfer, should be submitted.

§ 25.2512-8 Transfers for insufficient consideration

Transfers reached by the gift tax are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration to the extent that the value of the property transferred by the donor exceeds the value in money or money's worth of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a value

in money or money's worth, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift. Similarly, a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the spouse's property or estate, shall not be considered to any extent a consideration "in money or money's worth." See, however, section 2516 and the regulations thereunder with respect to certain transfers incident to a divorce.

§ 25.2514-3 Powers of appointment created after October 21, 1942

* * *

(e) Examples. The application of this section may be further illustrated by the following examples in each of which it is assumed, unless otherwise stated, that S has transferred property in trust after October 21, 1942, with the remainder payable to R at L's death, and that neither L nor R has any interest in or power over the enjoyment of the trust property except as is indicated separately in each example:

* * *

Example (3). The income is to be paid to L for life. L has a power, exercisable at any time, to cause the corpus to be distributed to himself. L has a general power of appointment over the remainder interest, the release of which constitutes a transfer for gift tax purposes of the remainder interest. If in this example L had a power to cause the corpus to be distributed only to X, L would have a power of appointment which is not a general

power of appointment, the exercise or release of which would not constitute a transfer of property for purposes of the gift tax.

* * *

No. 82-382

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In the Supreme Court of the United States

OCTOBER TERM, 1982

MYRA B. ROBINSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question in this gift tax case is whether petitioner, who was a Texas resident, made a completed gift in 1976, when she released her power of appointment over the remainder interest in a testamentary trust which had been created four years earlier under the provisions of her husband's will. The corpus of the trust consisted of petitioner's

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* Petitioner has erroneously named the United States as the respondent in the caption of the petition in this case. The case came to the court of appeals on appeal from a decision of the United States Tax Court, where, as required by the rules of that court, the Commissioner of Internal Revenue was named as respondent (Pet. App. A-17). Rules of Practice and Procedure of the United States Tax Court, Rule 60(b) (Jan. 1, 1974). The caption of the case in the court of appeals, likewise, correctly reflected the fact that the Commissioner of Internal Revenue was the appellee (Pet. App. A-1).

share of the community property at the time of her husband's death, which had been contributed to the trust pursuant to petitioner's election to accept the provisions of her husband's will in lieu of her share of the community property.

The pertinent facts, all of which were stipulated, may be summarized as follows: Petitioner was married to G.R. Robinson, who died testate on February 27, 1972 (Pet. App. A-18). Under the will of G.R. Robinson, petitioner was given a choice between accepting the benefits provided for her under his will and thereby consenting to the disposition of her share of the community property as provided in the will, or taking her share of the community property and receiving only a specific bequest of personal effects under the will (Pet. App. A-18). On August 22, 1972, petitioner elected to accept the benefits provided for her under her husband's will (Pet. App. A-18). Pursuant to this election and the terms of her husband's will, petitioner transferred her share of the community property to the "Myra B. Robinson Trust, the trust at issue in this case (Pet. App. A-18). Under the terms of the trust instrument (which was one of the clauses of her husband's will), petitioner was entitled to receive all the income from the trust during her lifetime, and she retained the power to appoint all or any part of the corpus of the trust to her children, to the surviving spouse of any deceased child, or to charity (Pet. App. A-3, A-18, A-20).

On March 26, 1976, petitioner released her retained power of appointment over the corpus of this trust (Pet. App. A-6, A-20). On audit, the Commissioner of Internal Revenue determined that this release was a taxable gift of the remainder interest in the trust because in executing the release she relinquished her dominion and control over that interest and fixed the rights of the remaindermen named in her husband's will (Pet. App. A-19, A-24).

In this proceeding brought by petitioner in the Tax Court for redetermination of the Commissioner's deficiency determination, the Tax Court upheld the Commissioner. It rejected petitioner's contention that she was entitled to offset the value of the remainder against the value of the income interest in her husband's trust (a separate trust created out of her husband's share of the community property under the provisions of his will) which she had received when she elected to accept the provisions of his will in 1972 (Pet. App. A-25). As the court pointed out (*ibid.*), petitioner was under no obligation to release her power of appointment over the assets of the Myra B. Robinson Trust in order to receive the income interest in her husband's trust. When she elected to take under her husband's will, she gave up control of the corpus of the trust during her lifetime, but she retained the power of appointment in issue in this case. After she began receiving the income from her husband's trust she retained the right to decide, through the exercise of her power of appointment, which of the beneficiaries named in her husband's will would receive her share of the community property and how much each would receive. Her release of that power in 1976 was entirely gratuitous, and, since it fixed the rights of the beneficiaries, it was a completed gift subject to the federal gift tax (Pet. App. A-25, A-26).

The court of appeals affirmed. The court rejected petitioner's contention that the power of appointment which she had released in 1976 was a special power of appointment, which could be released without incurring any gift tax liability as provided by Section 2514 of the Internal Revenue Code of 1954 (26 U.S.C.), and Treasury Regulations on Gift Tax (1954 Code), Section 25.2514-3(e) (26 C.F.R.). As the court pointed out (Pet. App. A-4), petitioner was the legal owner of her one-half interest in the community property, and, when she transferred her share

of the community property to the Myra B. Robinson trust by electing to take under her husband's will, she retained the power to control the disposition of the trust property by exercising or releasing her power of appointment (Pet. App. A-9). Because of this reserved power of apppointment, the election which petitioner made in 1972 did not deprive her of dominion and control over the remainder of the trust (Pet. App. A-9). Therefore, the release of her reserved power of appointment in 1976 was the taxable event which was subject to the gift tax under Section 2501 of the Internal Revenue Code. This transfer was not exempt under Section 2514 because the rights transferred had been a reserved incident of petitioner's community property ownership and had not been donated to her by her husband (Pet. App. A-10, A-11).

1. The decision below correctly held that petitioner's release of her power of appointment was a taxable gift. Petitioner errs in her assertion (Pet. 7-8) that the decision below in this case conflicts with *Commissioner* v. *Estate of Nelson*, 396 F.2d 519 (2d Cir. 1968); *Estate of Davis*, 440 F.2d 896 (3d Cir. 1971); and *Estate of Christ* v. *Commissioner*, 480 F.2d 171 (9th Cir. 1973). All of these cases involved the estate tax consequences of transfers of property with retained life estates made by the respective decedents. At issue in each case was an essentially factual dispute as to whether the transfer of property constituted a bona fide sale for an adequate and full consideration, in which event the value of the property transferred would not be includable in the decedent's gross estate under Section 2036(a) of the Internal Revenue Code of 1954. The court of appeals here did not question the existence or adequacy of the consideration which petitioner received in 1972 when she elected to take under her husband's will. Rather the court held, and correctly so, that the release in 1976 of her

reserved power of appointment over the assets previously transferred by petitioner was wholly gratuitous and constituted a taxable gift (Pet. App. A-8, A-9).

2. Petitioner's attempt (Pet. 8, 12) to have her husband regarded as the transferor of her interest in the community property because she elected to take under his will in 1972 reflects a fundamental misunderstanding of her rights under Texas community property law. Petitioner had a vested one-half interest in all community property accumulated during her marriage. *Commissioner* v. *Chase Manhattan Bank*, 259 F.2d 231, 238-239 (1958), cert. denied, 359 U.S. 913 (1959). This interest was not subject to her husband's testamentary power, and it was not includable in his gross estate for federal estate tax purposes. *Lang* v. *Commissioner*, 304 U.S. 264 (1938). Thus, the court of appeals correctly held (Pet. App. A-11) that petitioner, and not her husband, was the owner of her share of the community property—the property which she transferred to the Myra B. Robinson Trust when she elected to take under her husband's will. See *Estate of Christ, supra*, 480 F.2d at 172. Accordingly, the court correctly concluded (Pet. App. A-9, A-10) that the power which she retained to direct the disposition of the assets of that trust was a reserved power of appointment, and was not subject to the limitations of Section 2514 of the Internal Revenue Code on the taxability of the exercise or release of a donated power of appointment. See Treasury Regulations on Gift Tax (1954 Code), Section 25.2514-1(b)(2) (26 C.F.R.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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